COMMISSIONERS PROCEEDINGS
WEDNESDAY, JUNE 7, 2006
CLARK COUNTY, WASHINGTON

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Stuart, Morris, and Boldt, Chair, present.

PUBLIC MEETING: BLUE JAY'S GLEN INFILL SUBDIVISION – PLD2005-00087; SEP2005-00134; BLA2005-00090

The Board met to consider an appeal of the Clark County Land Use Hearings Examiner's decision in the matter of a Type III application for preliminary plat approval of a 10-lot residential subdivision on 1.45 acres zoned R1-6.

The Board of Commissioners received no public comment at this public meeting.

The Board certified they read the pertinent parts of the record.

Commissioner Morris asked if the Blue Jay's appeal was properly before the board. The appellant suggested it was not because Blue Jay was not actually a party of record. She wanted to know if it is not a legal party of record, if it really mattered.

Christopher Horne, Prosecuting Attorney, said he felt it was properly before the board and referred to a court case.

Morris referenced the stormwater appeal and asked if the hearings examiner was correct in giving little weight to the appellant's submission on January 27 because staff did not have time to review.

Horne responded that ultimate determinations of credibility are determinations that the examiner is charged with making and that neither this board nor the Superior Court review assessments of credibility. Horne said the fact that the hearings examiner says if it's not a proper or legal reason, could actually become an issue. He said that this board could certainly remand and provide staff with the opportunity. Whether or not it's just a simple question of timing, if that were the only basis upon which he concluded that Exhibit 71, which was the January 27 submittal, was granted the weight it was would resolve that question. However, according to LUPA factual determinations by the examiner, including credibility, [that] is his province and the Court of Appeals has indicated in a case called Hillside Terrace that the Court of Appeals does not have the authority to review credibility determinations of the examiners. Thus, it is somewhat limited.

Commissioner Stuart wanted to know what legal basis there was for not accepting the information provided before the end of the comment period.

Horne said Commissioner Stuart's question was, "when was the timing of the close of the record for the purposes of the submission of evidence and the question of weight?" Horne said his independent review and the best analysis he could give was that January 27 was

probably the close of evidence. Horne said it wasn't locked in stone because the hearings examiner gave his first date and clearly discussed the introduction of new evidence. He gave his last date as a rebuttal date and that's clearly a date in which new evidence is not allowed, but he doesn't say what happens with regard to the middle time period within which both parties are entitled to submit, what he calls, critiques of each others' information. He doesn't say you can't submit new evidence and the difficult part of all that is he says you can here. You can't here, but doesn't say what you can do here. It's something of a no man's land. Horne said that based on his review he believed a reasonable person might conclude that if he says you can't submit new evidence after this date, then you can't do it and presumes that for time periods before that you can. He said he would not say a court may necessarily agree with that, but he though it was a logical jump. The examiner did in fact review that information and the fact that he considered it all seems to be consistent with the fact that he thought it was part of the record because if it were not a part of the record he would have said it's not a part of the record. As to the weight it can be given, Horne said he thought he did talk to the lateness of the document, but he also gave other reasons that he gave it little weight and of course that's a separate question. And those had to do with the circumstances under which the test was taken, the information in regard to other information that was in the record and then the lateness of the information.

Morris said she thought the hearings examiner said the reason was that there was no time for staff to review it.

Horne said that was a factor.

Morris said it came in late, but the real reason was it came in too late for staff to review and maybe that doesn't matter.

Commissioner Boldt said there were two recommendations and one modification.

Horne said there were two separate recommendations because there were two appeals.

Alan Boguslawski, Department of Community Development, stated that in the applicant's appeal staff responded to the issue brought up regarding the hardship of the SEPA mitigation condition that the examiner had crafted with regard to at least one specific tree.

Boldt said that was the tree where the examiner said they had to build a half-width road, but there was a tree there.

Boguslawski said there was one off-site tree near that location that would be affected by the SEPA mitigation condition as written by the examiner.

Boldt said it was on the northeast corner of the site.

Stuart referred to page 5 of the hearings examiner's final order under drainage and asked if it was late in the process or too late.

Horne said the applicant transcribed the actual discussion that occurred between Mr. Karpinski, Mr. Eriksen, and the examiner himself, which is a part of the record, and he thought the language spoke for itself. He said it indicates that the first time period within which there was to be submission of new evidence was contemplated and authorized. In the last rebuttal period it was clearly prohibited, and in the intervening period it was somewhat undiscussed and so there was an open question now. Horne said the examiner did conclude at page 5 that that was too late, and then on page 17 he goes on to analyze that information. He said it's wasn't clear to him whether he considered it part of the record or not. Horne said the four time periods were as follows: December 16 was the applicant's supplement to the application; January 13 was the public and staff response to the new submission (looking at the hearings examiner's order at page 3 and 4); January 27 was all parties response to new materials, legal argument only and no new evidence according to the January 27 examiner's decision; and February 3 was the applicant's final rebuttal, no new evidence. He said the commissioner was correct in that on pages 4 and 5 there clearly appears to be, according to the examiner, a limitation on submission of new evidence after January 13, and if that's the case the submittal on the 27th would have been new evidence in violation of that order.

Stuart said that appeared to be the case, but he wasn't sure because of the way the hearings examiner addressed the issue in the text itself.

Morris stated that the conclusion regarding the late submittal is that it is not admissible as part of the record. It was her intention to uphold the hearings examiner on the matter of the detention pond. She said the hearings examiner had the evidence he needed in the record to make that determination. She said the staff suggested that should new information emerge during the final design elements that it would be an area where a post decision review in a public process could be examined, evaluated, and agreed to or not agreed to. Regarding the Wanke Subdivision, Morris said the only thing that exists in the record about when it was built was a reference and testimony to it having been built in 1992. She said the stormwater runoff regulations have been significantly changed since that subdivision was built and there are a whole new set of standards. Morris felt the hearings examiner, under the circumstances, was justified in reaching the conclusion he did and she could not overturn him as the Blue Jay's appeal has asked. She couldn't uphold the applicant's appeal, either, because that evidence is just not in the record that the infiltration will work. There's no clear statement by anyone who reviewed the data that the infiltration would work—staff had a statement that they have no evidence that it won't work, but they're not particularly persuaded. Given the difficulty there is in this area now with water and the number of complaints received from people who live next to subdivisions with faulty drainage systems, Morris felt this was one where the hearings examiner should be given his full due of authority.

Horne said if the board is affirming the examiner's decision in that regard there was no need for further factual foundation and adding citations to the record wouldn't change anything.

Stuart agreed with Morris. As far as the infiltration, he didn't find that the information could be included in the record based on the submission deadlines that were included as part of the record by the hearings examiner and that should have been followed for new evidence being submitted. He said the evidence that was relied upon by the hearings examiner not to allow infiltration was sufficient in that there was a back and forth conversation about whether lay people should be given any sort of deference or any sort of weight in determining whether infiltration was possible. He said people that have lived there for a lot of years know what does and does not drain where they live. He said based on the record it appears the basic requirements were met for a stormwater detention proposal; that there is some guidance that the applicant has demonstrated the basic feasibility, but that it is subject to conditions and final verification of the final stormwater plan in conjunction with final construction plan review which will assure that whatever gets done gets done right given the circumstances of how it gets developed. He found no reason to overturn the hearings examiner.

Boldt also agreed with Morris and Stuart. He did ask that in the future staff let the board know when there are two appeals.

MOVED by Stuart to uphold the hearings examiner in concluding that the applicant's preliminary stormwater plan is feasible. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See tape 281)

Morris stated that she couldn't remember ever having an appeal on a SEPA decision, but she didn't remember the hearings examiner ever deciding to just do a SEPA decision, either, on a single element of a proposal. In general, Morris said we don't do substantive SEPA, only procedural SEPA. She said her initial tendency was to think that the hearings examiner took a little latitude with his authorities, but she didn't know.

Horne said procedural SEPA is appealed directly from the examiner to Superior Court and substantive SEPA can come to the board, but substantive SEPA is rarely used by planning staff as a basis for imposing conditions. Horne said he was not sure whether the examiner initially did that. He thought staff originally recommended it as a condition and the examiner modified that slightly.

Boldt asked how Jim Vandling's letter entered into the decision.

Boguslawski said the staff report was issued, Exhibit 39, two weeks prior to the hearing and it was the SEPA determination with a SEPA mitigation condition. The language of that specific mitigation condition did result from some discussion with Mr. Vandling and was designed to help address issue that the neighbors had brought in their letters prior to the hearing for tree protection. He said that prior to the hearing the applicant appealed the

SEPA determination, and so, the SEPA appeal was heard by the examiner in the same hearing as the subdivision. Staff additionally made another recommendation -- Exhibit 48 from Jim Vandling, the County Forester. Based on the SEPA appeal, Mr. Vandling was recommending rewording the condition based on some additional evidence that had been provided by the applicant's forester. Subsequently, the examiner modified the mitigation condition even further to his liking.

Morris asked where the condition was.

Boguslawski said it was condition 1.

Morris said she would like to overturn the hearings examiner because she felt he didn't have substantial evidence in the record to require protection to the extent that he did. Mr. Vandling's additional condition recommendation had to do with getting a forest practice permit, not with how you deal with the on-site trees on a neighboring property. She was interested in the hearings examiner's discussion about this because the hearings examiner edges into a discussion about property rights and was almost like he was giving the trees adverse possession somehow or other. She didn't see anything in the record that justified the kinds of conditions that he's having imposed. On the staff recommendation, Morris said it appears that either you treat trees the same or you don't. So if the worry's about the trees then you shouldn't be able to just exclude one tree. You have to do them all in which case that means you have to go back and redo that whole section about the transportation. She felt that shouldn't be at the applicant's expense. Morris could not uphold the additional embellishment of the SEPA condition. She could agree with the SEPA condition that was recommended by staff which is to have an arborist to make sure they are not doing any damage to the tree roots, but the rest is excessive.

Boldt agreed and said the hearings examiner did overstep his latitude in demanding so many things of the applicant. He agreed to overturn the hearings examiner.

Stuart said he would dissent because the SEPA condition that was imposed was appealed because the applicant had said that the hearings examiner overstepped his bounds on making that determination and assigning that kind of mitigation, but the hearings examiner goes a long way to explain, not only why it's appropriate for the hearings examiner to make that decision because it talks about the potential damage to neighboring trees, exercise substantive SEPA authority and why they have the authority to do so. This specifically gives county ordinances that lend that authority to the hearings examiner because trees have not specifically been addressed but those aspects of the protection of the environment have been addressed in county ordinances, which gives the latitude to the hearings examiner to listen to evidence about what will or will not hurt the trees. There was written testimony from abutting neighbors. There was a neighbor, including expert testimony from a professional forester, that was included as expert testimony in the record that stated that trees close to the property lines could be harmed by, weakened, or damaged by the development activities on the site. I found that there was enough evidence for the hearings examiner to make that determination. Whether they went too

far or not in the determination of what that mitigation should be wasn't for me to decide. That was a factual determination for the hearings examiner to make based on the evidence presented in the record. He said beyond the dissent on this, there were several comments made within the record talking about the lack of any kind of county guidance on these specific issues for trees. He said if we do want to preserve any heritage regarding the big trees, the only way they will still be here is to develop a plan for how to make sure that they stay.

Boldt said that was a good point. He said this is the third appeal since he has been on the board where there has been mitigation. He said the parks department is aggressive and actively buying land.

Stuart said he would like to feed into the Parks, but also giving more incentives for low impact development that keep a lot of the big trees that enhance the neighborhood and provide for a better product.

MOVED by Morris to overturn the hearings examiner's conditions of approval for maintenance of the trees and substitute for them the original conditions of approval that were recommended by the county forester whose profession is trees and has been for many years, with the addition of acquire a forest practice permit. Commissioners Boldt and Morris voted aye. Stuart voted nay. Motion carried. (See tape 281)

BOARD OF COUNTY COMMISSIONERS

Marc Boldt, Chair

Steve Stuart, Commissioner

Betty Sue Morris, Commissioner

ATTEST:

Deputy Clerk of the Board
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